No. 96-1975

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RONALD COULTER, ET AL.,

Petitioners,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO THE PETITION

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July 14, 1997

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QUESTIONS PRESENTED

In the wake of a federal class action settlement in another court, the District Court below exercised its discretion under 28 U.S.C. § 1404(a) to transfer four civil actions involving apparent settlement class members to the federal court that previously had approved the settlement, had retained jurisdiction to enforce its final judgment, and had enjoined related litigation in other forums. The Court of Appeals denied without comment the petitions for extraordinary writs of mandamus to vacate the interlocutory, discretionary transfer orders. The certiorari petition in this Court raises two questions:

1. Did the Court of Appeals abuse its discretion in declining to issue extraordinary writs of mandamus to vacate the District Court's exercise of its discretion to transfer these actions to the forum of a related class action despite petitioners' assertion of a due-process right to "collaterally attack" the class action judgment in the forum of their choice, where the transfers will not prevent petitioners from "collaterally attacking" that judgment?

2. Did the Court of Appeals abuse its discretion in declining to issue the extraordinary writs of mandamus despite petitioners' contention that the McCarran-Ferguson Act requires application of Pennsylvania law to their claims, even though the District Court's transfer orders have no effect on applicable choice-of-law rules and the transferee court can apply Pennsylvania law to the extent appropriate?

LIST OF PARTIES BELOW AND LIST OF PARENT COMPANIES AND SUBSIDIARIES

Other than the parties listed in the petition, the parties in the lower courts include plaintiffs Christopher Clancy and Beth Raible and defendants James D. Spangler, Jeffrey J. Rodgers and Robert Martini.

Respondent Metropolitan Life Insurance Company ("MetLife") has no parent company. MetLife directly or indirectly owns for its own account at least 10% but less than 100% of the outstanding voting stock of the following publicly-traded companies:

Chart House Enterprises, Inc.
Lone Star Industries, Inc.
New England Investment Companies, L.P.

MetLife also directly or indirectly owns for its own account at least 10% but less than 100% of the outstanding voting stock of the following companies:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Aldrich Eastman Global Investment Strategies, LLC
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Capital Growth Management Limited Partnership

Chart House Enterprises, Inc.
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Copley Management Advisors, L.P.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.
Copley Public Partners Holding, L.P.
Copley Securities Corporation
Copley/Orchard Investors, Inc.
Copley/Orchard Investors, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors, L.P.
CTR Corp.
Dan River, Inc.
Eclipse Claim Services Inc.
Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
GS Blodgett Corporation
GS Blodgett International Ltd.
HACO Corp.
Harris Associates, Inc.
Harris Associates Securities, L.P.
Interbroker, Correduria de Reaseguros, S.A.
Kolon-Met Life Insurance Company
Lone Star Industries, Inc.

Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.P.
Mercadian Capital L.P.
Mercadian Funding L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Apartment Co-Investment Trust, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Structures
Morguard Investments Limited
Nailite International Inc.
NEF Corporation
NEIC Holdings, Inc.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP S.A.
Pesco Plus, L.C.
Pitco Frialator, Inc.
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Mexico)

Seguros Genesis, S.A. (Spain)
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.

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IN THE

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OCTOBER TERM, 1996

No. 96-1975

RONALD COULTER, ET AL.,

Petitioners,

– v. –

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO THE PETITION

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATUTES AND OTHER PROVISIONS INVOLVED

The petition involves 28 U.S.C. § 1404(a). Petitioners also purport to raise arguments under the Due Process Clause of the Fifth Amendment to the United States Constitution and under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. The text of the relevant provisions is reprinted in the appendix to this brief. [Appendix ("App.") 1a.]

STATEMENT OF THE CASE

This petition—which marks various petitioners' and their counsel's second attempt to obtain a writ of certiorari on the same

issues—arises from several discretionary orders by the United States District Court for the Western District of Pennsylvania transferring petitioners' four actions to the Middle District of Florida under 28 U.S.C. § 1404(a). The District Court in Florida previously had entered judgment in a nationwide class action settlement and had retained jurisdiction to enforce its judgment.

MetLife asked the Pennsylvania court to transfer petitioners' cases to Florida because petitioners are (or seek to represent) members of the settlement class and because the class action judgment precludes many of the claims petitioners continue to assert. In addition, petitioners' counsel and several of the petitioners actually had appeared and had litigated—and lost—their claims in the Florida federal court and on appeal. Not surprisingly, the certiorari petition nowhere cites the Eleventh Circuit decision rejecting all of petitioners' counsel's arguments as "frivolous" and imposing sanctions under Fed. R. App. P. 38. *See Grilli v. Metropolitan Life Ins. Co.*, 78 F.3d 1533, 1539 (11th Cir.), *clarified*, 92 F.3d 1074 (11th Cir.), *cert. denied sub nom. Coulter v. Metropolitan Life Ins. Co.*, 117 S. Ct. 608 (1996), *reh'g denied*, 117 S. Ct. 1121 (1997).

The District Court in Pennsylvania did not rule on the substance of petitioners' claims or MetLife's defenses. The court simply exercised its discretion to transfer the cases to the forum of the related class action in the interests of justice and convenience. Petitioners unsuccessfully sought mandamus from the Third Circuit and—despite their failure to meet any of the criteria of Sup. Ct. R. 10—have again petitioned this Court for certiorari.

A. Background of the Florida Class Action

On November 1, 1993, *Horton v. Metropolitan Life Insurance Company*, No. 93-1849-CIV-T-23A, was filed in the United States District Court for the Middle District of Florida. The plaintiffs asserted federal and state-law claims on behalf of a putative nationwide class of persons who had purchased MetLife whole life insurance policies as "retirement plans" or "savings plans" based on sales solicitations that allegedly had not fully disclosed that the products being sold were life insurance policies.

1. The *Horton* Settlement Agreement

After several months of arm's-length and at times acrimonious negotiations, MetLife and the *Horton* plaintiffs reached a proposed settlement. On April 22, 1994, the *Horton* court preliminarily approved the proposal and conditionally certified a nationwide opt-out settlement class under Fed. R. Civ. P. 23(b)(3), consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993. [Appendix to Petition for Certiorari ("Pet. App.") 249a, ¶ 1.]

The proposed settlement offered eligible class members full restitution of all net premiums they had paid to MetLife, plus interest (or, for persons with in-force policies, the option of an annuity funded in the amount of the cash refund). [App. 7a, ¶ 5.] In addition, MetLife agreed to pay the plaintiffs' attorneys' fees without diminishing the class members' recovery. The settlement resolves only those claims arising from past insurance sales. It does not purport to resolve claims arising from future conduct or to regulate MetLife's future conduct in any way.

Pursuant to the Settlement Agreement and the *Horton* court's order, notice of the proposed settlement was mailed to some 71,000 potential settlement class members and was published in various national and regional newspapers and magazines. [App. 11a, ¶¶ 15-16.] The court's order required all potential class members who did not wish to participate in the settlement class to submit written requests for exclusion by June 13, 1994. [Pet. App. 252a, ¶ 9.] The court also set a date for a hearing on class certification and final

approval of the settlement, at which class members could appear and object.

2. The Coulters' Participation in the Settlement Hearing

Ronald and Anissa Coulter, who are among the petitioners, appeared in the *Horton* action through their present attorneys (the "Behrend firm"). They did not file a timely request to opt out of the settlement class, but instead chose to object to the settlement and appear at the settlement hearing. *See Grilli*, 78 F.3d at 1536-37.

The Coulters also filed an "intervention" motion asking the *Horton* court (*i*) to "sever" all Pennsylvania residents from the *Horton* settlement class so the Coulters could seek to represent them in a separate putative class action, or, alternatively, (*ii*) to allow the Coulters to "retain" their own counsel on behalf of the Pennsylvania members of the *Horton* class. [Pet. App. 230a.] Although they have never been certified as representatives of any class, the Coulters and their counsel purported to speak on behalf of all Pennsylvania members of the *Horton* settlement class, whom the Coulters sought to represent as a putative "class" and "subclass" in the *Coulter* action in Pennsylvania. *See infra* pp. 7-8.

On July 18, 1994, the *Horton* court held a full-day evidentiary hearing on the proposed settlement, the Coulters' "intervention" motion, and various other matters. The Coulters, through the Behrend firm, appeared and objected to the proposed settlement. They also argued at length in support of their "intervention" motion. *See Grilli*, 78 F.3d at 1536.

3. The Final Judgment and Injunction in *Horton*

On October 25, 1994, the *Horton* court entered an order [App. 23a] and final judgment [*id.* 27a], supported by extensive findings of fact and conclusions of law [*id.* 6a], approving the class action settlement and dismissing all settlement class members' claims "on the merits and with prejudice" [*id.* 25a, ¶ 6; *id.* 28a, ¶ 2]. The court rejected all of the objections raised by the Coulters and the Behrend firm [*id.* 17a, ¶ 39], including their argument that alleged differences between the laws of Pennsylvania and other states made

class certification inappropriate [Pet. App. 132a-133a, ¶ 53]. The *Horton* court also concluded that the settlement class met the requirements of Fed. R. Civ. P. 23. [App. 15a-16a, ¶ 34; Pet. App. 128a-129a, ¶ 47.]

The court therefore ruled that "[t]he Settlement Agreement is and shall be binding on all settlement class members" [App. 24a, ¶ 4], and it released MetLife and its employees from, among other things, class members' claims related to the sale of whole life insurance policies as retirement or savings plans [*id.* 24a-25a, ¶ 5]. The court expressly retained continuing jurisdiction to enforce its orders and administer the settlement. [*Id.* 25a-26a, ¶ 7; *id.* 28a ¶ 3.] On November 8, 1995, pursuant to its retained jurisdiction, the court permanently enjoined all *Horton* class members and their attorneys and representatives (among others) from litigating *Horton*-related claims in any other forum. [Pet. App. 117a, ¶ 6.]

4. Denial of the Behrend Firm's *Horton* Motions

The *Horton* court not only rejected the Coulters' and the Behrend firm's objections to the proposed settlement; it also denied numerous motions filed by counsel and their various clients.

First, at the settlement hearing, the court orally denied the Coulters' "intervention" motion. The court later issued a written order, accompanied by detailed findings of fact and conclusions of law, on October 25, 1994. [Pet. App. 119a-134a.]

The court expressly found that "the Coulters are settlement class members." [Pet. App. 126a, ¶ 43.] They therefore had a "legally protectable interest in the subject of [the *Horton*] action." [*Id.*; *see also* Pet. App. 127a, ¶ 45 ("[a]s settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel").] But the court denied intervention because it found that the Coulters were adequately represented by class counsel and did not satisfy other prerequisites of Fed. R. Civ. P. 24. [*Id.* 126a-128a, ¶¶ 43-44, 46 ("reject[ing] the Coulters' argument that [the *Horton*] plaintiffs cannot or will not adequately represent their interests").]

After the oral denial of their "intervention" motion, the Coulters and various other Behrend firm clients moved for leave to opt out of the class belatedly. The court denied the motions, concluding that the movants had failed to show "excusable neglect" for their untimeliness, as required by Fed. R. Civ. P. 6(b)(2). Devoting particular attention to the Coulters, the court ruled that,

> [a]s class members, the Coulters [had] filed a notice of intention to appear and objections to the proposed settlement. . . . Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (i.e., exclusion of all Pennsylvania residents or appointment of their attorney as class counsel). However, they cannot have it both ways. *The Coulters had a choice to opt out or participate. They chose to participate.* [App. 36a (emphasis added).]

Various other persons represented by the Behrend firm — including petitioners Shelley Daughenbaugh and Robert Hemcher — filed yet another motion in the *Horton* court, this time seeking a declaration that they were not *Horton* class members. [*See id.* 39a.] Noting the total absence of specific evidentiary support for the motion, the *Horton* court denied it without prejudice, and directed that "any petitioner wishing to obtain a declaration of their status in relation to this class action shall file [with a special master] on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [*Id.* 40a.] The movants did not do so.

In addition, the Coulters and the Behrend firm moved for "injunctive relief," "remedial measures" and "sanctions," alleging that two MetLife sales representatives had improperly contacted several *Horton* class members. The motion sought "permission to conduct discovery, to require the issuance of a new class notice, to appoint their attorney, Behrend, as co-counsel for the class, and to award attorney's fees." *Grilli*, 78 F.3d at 1537. The *Horton* court denied this motion for lack of evidentiary support. Concluding that the motion "'appears to have been filed for the sole purpose of

causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorneys,'" the court *sua sponte* admonished the Coulters and the Behrend firm to "'remain mindful of the provisions of [Federal Rule of Civil Procedure] 11.'" *Id.* at 1537 n. 6 (quoting District Court).

5. The Behrend Firm's *Horton* Appeals

The Behrend firm, on behalf of the Coulters and its other clients (including petitioners Daughenbaugh and Hemcher), filed four appeals from the *Horton* court's rulings. However, neither the Behrend firm nor anyone else attempted to appeal the final judgment approving the class action settlement.

The Eleventh Circuit affirmed the *Horton* court's rulings in all respects, found all four of the Behrend firm's appeals "frivolous," and awarded "double costs and reasonable attorneys' fees" against the appellants. *Grilli*, 78 F.3d at 1535, 1539. The Behrend firm petitioned for rehearing, which was denied. Counsel then moved for leave to file a second petition for rehearing, but the Eleventh Circuit denied leave to file.

The Behrend firm and its clients next petitioned this Court for a writ of certiorari, which was denied. 117 S. Ct. 608 (1996). They then sought rehearing, which also was denied. 117 S. Ct. 1121 (1997).

B. Background of the Behrend Firm's Pennsylvania Actions

The four actions at issue in the present petition were filed by the Behrend firm in Pittsburgh, Pennsylvania. All four cases, like the *Horton* action, allege that MetLife sold life insurance policies as retirement or savings plans without fully disclosing that the products being sold were life insurance policies.

1. *Coulter v. MetLife*

The Behrend firm filed the *Coulter* putative class action on March 25, 1994, almost five months after the *Horton* case had commenced. The Complaint, as amended, purports to assert claims on behalf of 15 named plaintiffs and a putative "class" consisting of "all

of the Pennsylvania residents who purchased from [MetLife], life insurance policies or annuities which said [*sic*] policies or contracts covering life insurance or annuities were not formally approved by the Pennsylvania Insurance Commissioner." [Pet. App. 144a, ¶ 16.] The Complaint also purports to plead claims on behalf of a putative "subclass" consisting of:

> all Pennsylvania residents who purchased from [MetLife] a "50/50 Savings Plan," a "State Street Wealth Accumulation Plan," an "Individual Retirement Benefit Plan," a "Nurse's Insured Retirement Plan," a "Nurse's Guaranteed Retirement Plan," a "Tax Advantaged Bonus Plan," an "Enricher Insured Savings Plan," and/or any retirement and/or savings plan, which each [*sic*] was purported to have life insurance "components," but which in reality were [*sic*] nothing more than life insurance policies. [*Id.* 156a, ¶ 35.]

As to this putative "subclass," the Complaint alleges that MetLife "intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for." [*Id.* 158a-159a, ¶ 43.] The Complaint pleads that "MetLife was offering one product (the retirement/investment plans set forth in the paragraph above), and selling another (a life insurance policy)." [*Id.* 156a, ¶ 36.]

2. ***Rostek v. MetLife***

The Behrend firm filed the *Rostek* putative class action on June 30, 1994. The Complaint, as apparently modified by a later motion for class certification, purports to assert claims on behalf of eight named plaintiffs and a purported class of:

> All Pennsylvania residents who have purchased "college savings plans," which in reality were only large MetLife life insurance policies on children under eighteen years of age, in an amount in excess of $10,000.00. [*Rostek* Record ("R.") 20, ¶ 1.]

The *Rostek* Complaint charges that MetLife "intentionally sold life insurance policies as a college savings plan to consumers that were interested in purchasing a college savings plan for their child, not life insurance. The customers did not get what they had bargained for." [R.1, ¶ 4.] The complaint further alleges that "MetLife was offering one product (a College Savings Plan for the child and/or children) and selling another (a life insurance policy on the child and/or children)" [*id.* ¶ 3], and that MetLife "defraud[ed] customers by using sales tactics that failed to identify life insurance as the product of sale" [*id.* ¶ 6].[1]

3. ***Corriere v. MetLife***

The Behrend firm filed the *Corriere* case on May 8, 1995, long after the *Horton* court had entered its final judgment on October 25, 1994. The Corrieres, who did not opt out of the *Horton* settlement class, assert claims relating to their purchase of two whole life insurance policies issued during the class period.

The Complaint begins with allegations that MetLife

> developed a marketing technique under which its agents are trained and directed by MetLife to sell life insurance through a series of "scripted" misrepresentations, which led unsuspecting consumers to believe the policies they are purchasing are adequate vehicles to serve as *retirement or investment plans*. [R.6, Ex. E, ¶ 24 (emphasis added).]

The Complaint then alleges the Corrieres were the purported victims of this conduct: it asserts a MetLife sales representative "represented that these policies could provide the Plaintiffs with significant *savings* which could be used in the future for their *retirement*" [*id.* ¶ 31 (emphasis added)]. The Complaint also accuses MetLife of "engag[ing] in a pattern of misrepresenting the *nature*

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1. The named plaintiffs in *Rostek* are not *Horton* class members: one of them timely excluded himself from the settlement class, and the others do not come within the class definition. Many of the putative class members, however, appear to be *Horton* settlement class members, and the *Rostek* named plaintiffs purport to assert claims on their behalf.

[a]nd terms of the products that they were selling to the Plaintiffs, with the intent of inducing the Plaintiffs to purchase *something other than what it was represented to be*" [*id.* ¶ 71 (emphasis added)].

4. *Smith v. MetLife*

The Behrend firm filed the *Smith* action on behalf of Douglas Smith in October 1995, and later commenced a separate action on his behalf against another defendant (a MetLife sales representative) in January 1996. The Behrend firm then moved to consolidate the two cases and explained that

> [b]oth actions arise out of a series of solicitations in which the Defendant agents, Jeffrey J. Rodgers and Robert Martini, together, on behalf of their principal, [MetLife], fraudulently induced the Plaintiff to purchase a life insurance policy through *misrepresentations that this policy was a "retirement plan."* [R.5, Ex. E, ¶ 1 (emphasis added).]

The life insurance policy Smith had purchased was a whole life insurance policy issued during the *Horton* class period. Smith did not opt out of the *Horton* settlement class.

C. The Transfer Motions

MetLife moved to transfer the *Coulter*, *Rostek*, *Smith* and *Corriere* cases to the *Horton* court under 28 U.S.C. § 1404(a). The motion stressed (*i*) the significant overlap between the *Coulter* putative "subclass," the *Rostek* putative class and the *Horton* settlement class, (*ii*) the Behrend firm's and various plaintiffs' extensive, voluntary participation in *Horton*, (*iii*) the *Horton* court's rulings that the Coulters and other plaintiffs were *Horton* class members, and (*iv*) the Corrieres' and Smith's apparent membership in the *Horton* class. Emphasizing the *Horton* court's retention of continuing jurisdiction, its permanent injunction order, and its appointment of a special master to resolve disputes about class membership, MetLife urged that the *Horton* court was the more appropriate and convenient forum to decide whether and to what extent the *Coulter*, *Rostek*, *Corriere* and *Smith* plaintiffs and putative class members were subject to the orders and judgment in *Horton*.

The District Court agreed. Without deciding whether petitioners were or were not *Horton* class members, and without ruling on any other substantive issues, the court exercised its discretion to transfer the four cases to the Middle District of Florida so the *Horton* court could decide questions about *Horton* class membership and the scope of the *Horton* judgment. The District Court concluded:

> This court ought not to sit in judgment of the actual decisions reached by its sister court in Florida with respect to the *Coulter* plaintiffs. Nor should this court accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve *Horton* class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs in both the *Coulter* and *Rostek* actions necessarily involve[s] review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient, and appropriate, forum of litigating those issues is the United States District Court for the Middle District of Florida.

[Pet. App. 63a-64a (magistrate judge's report); *id.* 45a-46a (order adopting report as court's opinion).][2]

The District Court's ruling in *Smith* also cited the *Horton* court's appointment of a special master to decide issues relating to class membership—a process the Eleventh Circuit previously had approved on appeal, *see Grilli*, 78 F.3d at 1538-39. As the District Court observed:

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2. *Accord* Pet. App. 84a (magistrate judge's report in *Corriere*) ("the initial determination of whether the plaintiffs here are members of the *Horton* class, and whether they are bound by the orders entered in *Horton*, should be made by that court"); *id.* 74a (magistrate judge's report in *Smith*) (cases were transferred to *Horton* court "so that it can exercise the very jurisdiction which it has retained to determine, in the first instance, whether plaintiff is, in fact, barred by the *Horton* settlement"); *id.* 40a, 51a (orders adopting reports as court's opinions).

> A process has been established in th[e] [*Horton*] court [for determining class membership], and this court should not permit plaintiff and others to challenge the *Horton* settlement piecemeal in courts all over the nation. [Pet. App. 74a.]

The *Coulter*, *Rostek* and *Corriere* plaintiffs then asked the District Court to certify its transfer orders for interlocutory appeal under 28 U.S.C. § 1292(b).[3] The court denied the requests [App. 3a-5a], because the transfer orders did not involve any "controlling question of law," as § 1292(b) requires.

The court expressly rejected the contention that it had ruled against petitioners on any of the legal questions they had raised. For example, the court held it had "authority" to decide whether petitioners could make "collateral attacks on class action settlements in the forum of the Plaintiffs' choice," but concluded that

> this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and my decision to transfer is not a ruling as a matter of law that no such authority exists. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. Thus, the decision in this case was discretionary, and not a question of controlling law. [App. 4a.]

Similarly, the District Court concluded that it had authority to rule on the *Horton* judgment's preclusive effect but that it nevertheless had exercised its discretion to allow the *Horton* court to make that determination:

> I determined that a discretionary transfer was warranted pursuant to 28 U.S.C. § 1404(a), and that, although I could address the questions presented, it would be more appropriate for the Florida court to do so. [*Id.*]

D. The Mandamus Petitions

The Behrend firm filed three mandamus petitions in the United States Court of Appeals for the Third Circuit (one for *Coulter*

3. Smith also sought § 1292(b) certification but then filed a mandamus petition before the District Court ruled on the request.

and *Rostek*, one for *Corriere*, and one for *Smith*) asking the court to order the District Court to vacate its transfer orders. The Court of Appeals denied all three petitions without comment.

Petitioners then filed a "Petition for Rehearing En Banc." The Court of Appeals, treating the petition as both a petition for panel rehearing and a suggestion for rehearing en banc, denied it. The Behrend firm's latest certiorari petition followed.

REASONS FOR DENYING THE WRIT

Petitioners' contentions that the Due Process Clause and the McCarran-Ferguson Act somehow bar the transfer of these cases to the *Horton* court are devoid of merit. The District Court's transfer orders were routine exercises of discretion that raise no substantial legal issues and impair no substantive rights. Neither the discretionary transfer orders nor the Third Circuit's discretionary denials of mandamus present any "important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and there is no reason to grant certiorari.

Petitioners' attempted "collateral attack" on *Horton* is nothing more than an abusive attempt to relitigate matters they and their counsel already litigated and lost. But regardless of whether a "collateral attack" is or is not available, arguments about the correctness of the *Horton* judgment are irrelevant to the rulings below. The transfer orders did not decide any substantive issues, so petitioners may raise in the Middle District of Florida any claims they could have raised in the Pennsylvania court. And petitioners' arguments lack merit in any event.

I.

THE DISTRICT COURT'S DISCRETIONARY TRANSFER ORDERS PRESENT NO IMPORTANT QUESTION OF LAW WARRANTING THIS COURT'S REVIEW.

A. The Due Process Clause Does Not Guarantee Petitioners an Unrestricted Choice of Venue for a "Collateral Attack."

Petitioners' primary argument is that they allegedly have a "constitutional right" to "collaterally attack" the *Horton* court's orders and judgment in any forum of their choice, and that this alleged right somehow overrides the District Court's authority to transfer a case under 28 U.S.C. § 1404(a) to promote the interests of justice, convenience, judicial economy, and respect for the rulings of a court of coordinate jurisdiction. Petitioners are wrong.

Petitioners' asserted due-process right to challenge the adequacy of representation in *Horton* is not at issue here. The only question is whether petitioners have a constitutional right to insist that a *particular* federal court hear that challenge, even when the court in which the challenge has been raised believes, in its discretion, that another court is the more appropriate forum to decide the issue.

It is beyond question that Congress has broad power to establish lower federal courts, allocate jurisdiction among them, and enact laws regulating the conduct of litigation in those courts. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). One of those laws is § 1404(a), which empowers district courts to transfer cases to other districts when "the interest of justice" would be served by doing so. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31-32 (1988).

In light of § 1404(a), petitioners cannot claim any constitutional right to *require* a particular federal court to hear a dispute even when the court believes § 1404(a)'s considerations point to another court. Due process requires only an "opportunity to be heard," *e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)—not an opportunity to forum-shop.

Indeed, if petitioners' argument were correct, no federal court ever could transfer a case under § 1404(a) if a plaintiff objected. *Every* plaintiff could insist he or she had a "constitutional right" to be heard in his or her chosen forum, regardless of whether the same issues could be litigated elsewhere, and regardless of whether the interests of justice favored a transfer. This view of the Due Process Clause obviously is not the law.

Nor have petitioners offered any reason why "collateral attacks" on class-action judgments should be uniquely exempted from the change-of-venue statute applicable to all other cases. As the Second Circuit held in *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994):

> [N]othing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch [an attack on a class-action judgment]. While the law as a general rule permits a plaintiff to choose his forum, that freedom is not absolute, as the removal, venue and multidistrict litigation statutes and the personal jurisdiction and forum non conveniens doctrines all demonstrate.

996 F.2d at 1432 (affirming injunction against class members' attempts to collaterally attack federal class-action settlement in Texas state courts).[4]

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4. Petitioners' contention that their "collateral attack" exempts them from the ordinary rules governing transfer of venue rests almost entirely on their misreading of a single Third Circuit case, *In re Real Estate Title & Settlement Services Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), which held that a District Court should not *enjoin* members of a *non-opt-out* class from collaterally attacking a federal class-action settlement in state court if those persons lacked minimum contacts with the class-action forum. That decision, however, has nothing to do with an order *transferring* cases filed by persons who (*i*) are members of a certified *opt-out* class, (*ii*) did *not* exercise their right to exclude themselves from the class, (*iii*) appeared and objected through counsel in the court that had certified the class action, and (*iv*) actually litigated and lost their arguments at each level.

The District Court's transfer orders did not decide whether petitioners are class members. Nor did the orders determine the preclusive effect of the *Horton* judgment. Nor did the court make any other substantive rulings on petitioners' claims. Because petitioners remain free to raise whatever arguments they wish in the Middle District of Florida (subject, of course, to the same preclusion principles that would have applied in Pennsylvania), the transfer orders do not impair their alleged right to litigate the merits of their "collateral attack." Petitioners' due-process argument thus is without merit.

B. The McCarran-Ferguson Act Did Not Require the District Court to Deny the Transfer Motions.

Petitioners also contend [at 28-29] that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, requires the application of Pennsylvania law to their claims and therefore precluded the transfers. Like the due-process argument, this contention is irrelevant to the transfer orders.

As the very cases cited by petitioners demonstrate, the transfer of these actions does not change the applicable substantive law. *E.g., Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (after § 1404(a) transfer, transferee forum must apply transferor forum's choice-of-law rules); *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (same). Any issues governed by Pennsylvania law in the transferor forum will continue to be governed by Pennsylvania law in the transferee forum.

Thus, even if petitioners were correct that the McCarran-Ferguson Act entitled them to have Pennsylvania law applied to their claims (*but see infra* pp. 25-26), the transfer would not in any way impair that alleged right. The McCarran-Ferguson Act nowhere suggests that, where Pennsylvania law applies, it must be applied in Pennsylvania by a Pennsylvania court.

II.

THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION IN DENYING MANDAMUS TO REVIEW THE DISCRETIONARY TRANSFER ORDERS.

Not only do the discretionary transfer orders fail to present any substantial question worthy of review; the Third Circuit's refusal to grant extraordinary mandamus relief was itself an exercise of discretion that does not call for a grant of certiorari.

Mandamus is an extraordinary remedy available only in circumstances "amounting to a judicial usurpation of power." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quotation marks omitted). The party seeking mandamus must show that there is no adequate alternative means of relief and that the "right to issuance of the writ is 'clear and indisputable.'" *Helstoski v. Meanor*, 442 U.S. 500, 505 (1979). Moreover, even when the prerequisites for mandamus are satisfied, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed"—here, the Court of Appeals. *Id.*

Petitioners certainly do not have any "clear and indisputable" right to an exemption from § 1404(a) merely because they seek to "collaterally attack" a class-action judgment. Moreover, because the transfer orders did not decide petitioners' substantive claims, petitioners have an adequate remedy in the Middle District of Florida and, if appropriate, in the Eleventh Circuit. The Third Circuit's denial of mandamus thus was clearly within that court's discretion and presents no important legal issues for this Court's consideration.

In addition, mandamus would not have been appropriate to overturn the District Court's fact-specific, discretionary transfer determinations. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to [the trial court's] discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'"). This Court has held that § 1404(a) invests the District Courts with broad discretion to "adjudicate motions for transfer according to an individualized,

case-by-case consideration of convenience and fairness" and "to weigh in the balance a number of case-specific factors." *Stewart Org.*, 487 U.S. at 29 (quotation marks omitted). The District Court here merely exercised that discretion based on its analysis of the unique facts of these particular cases.

Contrary to petitioners' repeated assertions, the District Court did not grant the motions because it felt it lacked the power to adjudicate petitioners' claims. Rather, the court transferred the cases because it believed, in its discretion, that transfers were *appropriate* in light of § 1404(a)'s considerations and the *Horton* court's rulings. As the court explained in declining to certify its orders for interlocutory appeal under 28 U.S.C. § 1292(b):

> Plaintiffs assert that they are entitled to collaterally attack a class action settlement, such as the *Horton* settlement, in the forum of their choice, and that this is the controlling question of law involved in this case. . . . Plaintiffs argue that I ignored precedent which permits such collateral attacks on class action settlements to be made in the forum of the Plaintiffs' choice. Indeed, *I have the authority to reach such questions*. . . . In my view, however, this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and *my decision to transfer is not a ruling as a matter of law that no such authority exists*. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. Thus, *the decision in this case was discretionary*, and not a question of controlling law. [App. 4a (emphasis added; citation omitted).]

Petitioners' contention [at 15] that the District Court "found it could not entertain a collateral attack on the class action rulings of a non-Pennsylvania court" thus misstates the court's orders.

The District Court clearly did not abuse its discretion in so ruling. Courts throughout the country repeatedly have held that transferring later-filed cases such as these to another District Court is appropriate where, as here, the other court is exercising continuing

jurisdiction over the subject matter of the later-filed actions.[5] Indeed, eight other federal district judges have transferred to the *Horton* court ten other cases filed by litigants who appeared to be *Horton* settlement class members. As one of those courts explained,

> [t]he *Horton* Court is more familiar with the issues surrounding the certification of the *Horton* class. The *Horton* court additionally retained jurisdiction over subsequent actions impacting upon the *Horton* settlement. It is therefore in the interest of judicial economy that this case be transferred to Florida. . . .

Taylor v. Metropolitan Life Ins. Co., No. 95-0933-BH-S (S.D. Ala. Feb. 1, 1996).[6]

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5. *E.g., In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1431 (affirming removal and transfer of cases to federal court that had settled prior class action, so that court could determine plaintiffs' membership in settlement class); *Carver v. Knox County*, 887 F.2d 1287, 1289-93 (6th Cir. 1989) (transferring class members' claims to court hearing previously filed class action), *cert. denied*, 495 U.S. 919 (1990); *Spears v. Johnson*, 859 F.2d 853, 855 (11th Cir. 1988) (transferring class member's case to another court with continuing jurisdiction over class action), *vacated in part on other grounds*, 876 F.2d 1485 (11th Cir. 1989); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728-29 (5th Cir. 1985) (holding that District Court should have dismissed or stayed action or transferred it to court hearing pending action involving closely related issues); *Gregory-Portland Indep. School Dist. v. Texas Educ. Agency*, 576 F.2d 81, 82 (5th Cir. 1978) (court should have transferred action to other District Court because case involved latter court's orders and continuing jurisdiction), *cert. denied*, 440 U.S. 946 (1979); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (where one District Court has been adjudicating issues and has enjoined litigation of related matter in second court, second court must either transfer related suit to first court or dismiss case); *see also Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1487-88 (D.C. Cir. 1992) (court in which settlement class member had collaterally attacked judgment "properly declined to consider [plaintiff's] argument" but "might have entertained a timely motion to transfer" to class action forum).

6. *Accord Dailey v. Metropolitan Life Ins. Co.*, No. 1:97-0008-RV-S (S.D. Ala. June 13, 1997); *Jones v. Metropolitan Life Ins. Co.*, No. 96-A-754-S (M.D. Ala. Nov. 7, 1996); *Hanlon v. Metropolitan Life Ins. Co.*, No. 1:96 CV 1349 (N.D. Ohio July 22, 1996); *Singleton v. Metropolitan Life Ins. Co.*, No. 96-0309-

(continued...)

There is also no basis for petitioners' contention [at 10] that the transfer orders will require any trial on the merits to be held in Florida. If the *Horton* court determines that any of petitioners' claims are not precluded by the *Horton* judgment and that the parties' convenience and the interests of justice favor trying those claims in Pennsylvania, the court will have the discretion to transfer the cases back to the Western District of Pennsylvania.

For all these reasons, the District Court's discretionary use of § 1404(a) to promote judicial efficiency and comity among the federal courts was entirely appropriate. And the Third Circuit certainly did not abuse its discretion in refusing to issue extraordinary writs of mandamus to vacate the discretionary transfer orders.

III.

PETITIONERS' ATTACK ON THE *HORTON* JUDGMENT IS IMPROPER, IRRELEVANT AND MERITLESS.

A. The *Horton* Judgment Is Not Properly Before This Court.

Petitioners devote much of their petition [at 15-20, 25-29] to contesting the *Horton* court's judgment and arguing they should not be bound by it. Those issues, however, are not properly before this Court.

The District Court did not rule on the *merits* of petitioners' attack on *Horton*. The court simply concluded that the Florida court was in a better position to decide those issues.[7] The Court of Appeals

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6. (...continued)
AH-C (S.D. Ala. June 21, 1996); *Helton v. Metropolitan Life Ins. Co.*, No. 95-0934-BH-S (S.D. Ala. Feb. 1, 1996); *Hunter v. Metropolitan Life Ins. Co.*, No. 95-0935-BH-S (S.D. Ala. Feb. 1, 1996); *Harrison v. Metropolitan Life Ins. Co.*, No. CV 95-B-2044-NW (N.D. Ala. Dec. 5, 1995); *Sutton v. Metropolitan Life Ins. Co.*, No. 2:95-CV-308 (E.D. Tenn. Nov. 17, 1995); *Ladnier v. Metropolitan Life Ins. Co.*, No. 95-0300-B-C (S.D. Ala. Apr. 14, 1995).

7. *See* Pet. App. 83a ("I do not believe . . . that the merits of these arguments should be reached by this court. Rather, the initial question is which court ought to address the merits of these arguments"); *id.* 74a ("The remaining (continued...)

also did not reach the merits; it merely exercised its discretion to deny mandamus to overturn the transfer orders.

Petitioners' purported right to "collaterally attack" the *Horton* judgment thus has not yet been decided. If petitioners and the Behrend firm continue to litigate their claims and lose, they can appeal any final judgment to the Eleventh Circuit and then petition this Court for certiorari. Until then, they have no jurisdictional basis to raise the issue in this Court.

B. Res Judicata Precludes Petitioners' Attack on the *Horton* Judgment.

In any event, however, there is no merit to petitioners' claim of a broad right of "collateral attack" that allows them to reopen all the class certification issues they and their attorneys litigated and lost in the *Horton* case. Thus, a grant of certiorari would be inappropriate even if those issues had been decided below.

It is beyond dispute that a class-action judgment is binding on all class members and precludes relitigation if those persons were adequately represented. *See, e.g., Shutts*, 472 U.S. at 808 ("The absent [class members] would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it"). As *Hansberry* declared,

> members of a class not present as parties to the litigation may be bound by the judgment *where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which*

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7. (...continued)
arguments raised by plaintiff need not be addressed on their merits. The real question is whether this court or the Florida court should address them"); *id.* 64a ("The most convenient, and appropriate, forum of litigating those issues is the . . . Middle District of Florida").

> *members of the class are present as parties,* or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason *the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.*

Id. at 42-43 (emphasis added; citations omitted).

Here, petitioners' attorneys "actually participate[d] in the conduct" of the *Horton* action on behalf of numerous clients, including the Coulters, Daughenbaugh and Hemcher. *Id.* at 43. Petitioners cannot now invoke "adequacy of representation" as a way to avoid the *Horton* judgment.

Moreover, *Horton* class members such as petitioners were adequately represented in the class action even without the Behrend firm's participation. The *Horton* court expressly

> reject[ed] the Coulters' argument that [the *Horton*] plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles. [Pet. App. 128a, ¶ 46.]

Petitioners' assertion [at 18] that "[t]he Tampa Court made no pretense that the interests of the Pennsylvania petitioners were being adequately represented" thus misrepresents the record.

Not only were petitioners actually and adequately represented in *Horton*; they also had ample opportunity to opt out of the class if they were dissatisfied with either their representation or the proposed settlement. As the *Horton* court observed:

> This Court's April 22, 1994 Order . . . allowed the Coulters—and any other dissatisfied Pennsylvania residents within the settlement class—to opt out of the settlement class and litigate elsewhere if they chose to do so. . . . In the

> alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. . . . As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights.

[Pet. App. 126a-127a, ¶¶ 43-45.]

Instead of opting out, however, the Behrend firm and its clients fully used (indeed, abused) their opportunity to participate. They filed objections to the settlement, challenging—among other things—adequacy of representation [*see, e.g.*, Pet. App. 230a, ¶ 25], and they appeared and argued at the settlement hearing [*id.* 127a, ¶ 44; App. 12a, ¶ 21]. The *Horton* court fully considered and rejected these objections on the merits, including the "adequacy of representation" issue. [App. 17a, ¶ 39; Pet. App. 128a, ¶¶ 46-47.]

The Behrend firm and its clients then prosecuted four unsuccessful—indeed, "frivolous"—appeals to the Eleventh Circuit, and then unsuccessfully sought certiorari. In light of this record, petitioners' assertion [at 19] that they were not "allowed" to "challenge the adequacy of their representation" is preposterous.

In addition to having already litigated and lost the adequacy-of-representation issue, the Behrend firm and its clients also litigated and lost the other arguments they now seek to relitigate, such as their arguments about Pennsylvania law. Petitioners and their counsel specifically contended in *Horton* that "[t]he Coulter Class and sub-class members . . . are entitled to the application of Pennsylvania law to their causes of action" [Pet. App. 224a, ¶ 10]. The *Horton* court "considered and rejected" these arguments [App. 17a, ¶ 39], holding that the contention about Pennsylvania law was "unfounded" in the context of a settlement, because a court does not decide claims in reviewing a settlement [Pet. App. 132a, ¶ 53]. *See infra* pp. 25-26.

Petitioners' counsel also argued in *Horton* that the proposed class did not meet the requirements of Fed. R. Civ. P. 23. [*E.g.*, Pet. App. 227a-230a, ¶¶ 22-25.] The *Horton* court considered and rejected this argument as well, concluding that the settlement class met all of Rule 23's requirements [App. 15a, ¶ 34; Pet. App. 128a-129a, ¶ 47] and that the Coulters were settlement class members [Pet. App. 126a-127a, ¶¶ 43, 45].

Petitioners thus cannot pretend to be strangers to the *Horton* litigation. Their own attorneys—and some of the petitioners themselves—previously raised the same arguments asserted here, and they lost at every level. Having had a full and fair opportunity to be heard in the *Horton* court and on appeal, petitioners now are bound by the *Horton* judgment. *See, e.g.*, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558-61 (3d Cir.) (class members who had chance to object to adequacy of representation at settlement hearing were precluded from relitigating issue), *cert. denied*, 513 U.S. 986 (1994); *Laskey v. International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) (similar); *see also Hansberry*, 311 U.S. at 43 (due process does not prevent class judgment from being binding on class members as long as "the procedure [was] so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue").

Petitioners' mere disagreement with the *Horton* court's and the Eleventh Circuit's rulings does not permit them to ignore the fundamental "rule . . . of public policy and private peace" "that there be an end of litigation [and] that those who have contested an issue shall be bound by the result of the contest." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (quotation marks omitted). Having litigated and lost at every juncture in the *Horton* case, petitioners and their attorneys do not have any constitutional right to start all over again in another judicial Circuit.

C. The McCarran-Ferguson Act Did Not Bar the *Horton* Settlement.

Not only are petitioners' and their attorneys' criticisms of the *Horton* settlement precluded; they also are groundless. Petitioners' principal argument [at 28] appears to be that the McCarran-Ferguson Act—which declares that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation . . . of such business," 15 U.S.C. § 1012(a)—should have prevented certification of the *Horton* class. This contention misconstrues the effect of the *Horton* settlement.

The *Horton* settlement does not intrude on the states' role in regulating the business of insurance. It simply provides for the compromise and settlement of certain *existing* claims in exchange for the refund of net premiums plus interest or the issuance of new annuity contracts. [*See* App. 7a-8a, ¶¶ 5-6.] The settlement does not prescribe any standards for insurance transactions and does not regulate the sale of insurance policies. Nor does it involve any continuing relief applicable to future insurance sales. It affects only claims arising from certain insurance policies purchased by class members before October 31, 1993. [*Id.* 8a, ¶ 8(a).]

Moreover, nothing in the *Horton* settlement purports to exempt MetLife from state insurance laws or to impair state regulators' ability to enforce them. In fact, the insurance regulators from virtually every state in the country approved the terms of the settlement [App. 21a, ¶ 51], and counsel for the Florida Department of Insurance appeared at the settlement hearing to testify in favor of it [Plaintiffs' Mandamus Ex. 5 at 7-8, 26-27, 44-45, 101-04, 195-98]. Petitioners' argument [at 28-29] that the settlement somehow "violated" the "national policy that the insurance industry is subject to State laws and regulations" thus is specious.

Contrary to petitioners' assertion [at 28], the *Horton* court did not "issue[] a uniform nationwide injunction affecting the marketing of insurance policies." The injunction to which petitioners refer merely enjoins class members from litigating civil actions barred by the *Horton* judgment in any forum other than the Middle District of

Florida. [Pet. App. 117a, ¶ 6.] It says nothing whatsoever about the marketing of insurance. [*See id.* 113a-118a.]

Petitioners' contention [at 22] that the *Horton* court erred by not "applying" Pennsylvania insurance law to their claims is equally meritless. The *Horton* case was *settled*. It was not litigated to judgment on the merits. The court thus had no occasion to "apply" Pennsylvania law—or any other particular law—to the merits of plaintiffs' claims. [*See* Pet. App. 132a, ¶ 53.][8]

However, if petitioners mean the *Horton* court did not *consider* the merits of their Pennsylvania-law arguments in determining the propriety of class certification and the fairness of the settlement, that contention is untenable. As discussed above, the Behrend firm and the other parties extensively briefed the substantive issues in the case, and the *Horton* court fully considered them. [*See, e.g.*, App. 13a-15a, 20a, ¶¶ 26, 32, 44 (discussing how merits of plaintiffs' claims bear on fairness of settlement).] The court rejected all of the Behrend firm's arguments [App. 17a, ¶ 39], including the erroneous contention that differences between Pennsylvania law and the laws of other states required excluding Pennsylvania residents from the settlement class [*e.g.*, Pet. App. 225a-226a, 230a, ¶¶ 13-15, 25].[9]

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8. *See also, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.) ("The court need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements") (quotation marks omitted), *cert. denied*, 506 U.S. 953 (1992); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("in evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not [to] try the case in the settlement hearings").

9. For this reason, the cases petitioners cite [at 16-17] are inapposite. Those cases do not say that *any* differences in state law will preclude class certification; they hold only that the trial court should *consider* those differences in determining, under Rule 23(b)(3), whether common questions predominate and whether a class action is superior to other methods of adjudication. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (reversing class certification where

(continued...)

Contrary to petitioners' assertion, there is no inconsistency between the *Horton* settlement relief and the remedies petitioners say would have been available under Pennsylvania law. The purported Pennsylvania-law remedies—punitive or treble damages—also were potentially available for the same conduct under the RICO, statutory or common-law theories pleaded in *Horton*. Petitioners therefore cannot demonstrate any conflict of interest between the Pennsylvania class members and the rest of the class. The settlement for full restitution plus interest was equally fair and adequate under the laws of every state, as the *Horton* court found.

D. Petitioners' Other Attacks on the *Horton* Settlement Are Also Baseless.

Petitioners' reliance [at 17] on the Third Circuit's decision in *Georgine v. Amchem Products*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, No. 96-270, 1997 U.S. LEXIS 4032 (June 25, 1997), is equally unavailing. As this Court confirmed in *Windsor*, the *Horton* court was not required to ignore the proposed settlement in considering whether to certify the class under Rule 23(b)(3). 1997 U.S. LEXIS 4032, at *50-51.

Moreover, the *Horton* class bears no resemblance to the one certified in *Windsor*. The members of the *Horton* class, unlike the *Windsor* personal-injury class members, all allegedly suffered the same general kind of purely economic harm: they all paid money for policies that purportedly had been misrepresented to them, and their losses were easily quantifiable.

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9. (...continued)
District Court "failed to *consider* how variations in state law affect predominance and superiority") (emphasis added); *In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class where District Court "failed to *consider* how the law of negligence differs from jurisdiction to jurisdiction") (emphasis added); *see also Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (9th Cir. 1996) (reversing provisional class certification entered without any record showing compliance with Rule 23's requirements); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.) (citing differences among states' negligence laws as reasons for decertifying class, in light of unmanageability of accurately instructing jury on laws of all 50 states), *cert. denied*, 116 S. Ct. 184 (1995).

In addition, the *Horton* settlement did not pose any of the risks of intraclass conflicts that caused concern in *Windsor*. The *Horton* settlement offered full relief (restitution of net premiums plus interest) to each individual class member, without any caps or any conflicts in allocation among class members. Also, the *Horton* plaintiffs, unlike the ones in *Windsor*, filed their action fully intending to litigate it. The *Horton* settlement class thus did not have any of the structural problems that otherwise might have prevented the class representatives from adequately representing the entire class.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 14, 1997

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STATUTORY AND OTHER PROVISIONS

Title 28, United States Code

§ 1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

. . . .

United States Constitution

Amendment V.

No person shall . . . be deprived of life, liberty, or property, without due process of law.

McCarran-Ferguson Act §§ 1-2, 15 U.S.C. §§ 1011-1012

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE THE METROPOLITAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION	Master Docket No. 96-179 MDL No. 1091 Judge D.W. Ambrose Magistrate Judge Benson
THIS DOCUMENT RELATES TO:	
COULTER v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-0629	
and	
ROSTEK v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-1108	
and	
CORRIERE v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 96-0833	

MEMORANDUM ORDER OF COURT

Plaintiffs Coulter (94-0629), Rostek (94-1108) and Corriere (96-0833) have filed Motions to Amend Interlocutory Order Granting Defendant's Motion to Transfer (Docket #: 23 at No. 96-0833 and Docket #: 105 at Nos. 94-0629 and 94-1108), seeking an amendment of the Order so that an appeal from the Orders, which are interlocutory, may be requested.

An interlocutory order should be certified for appeal where the order "involves a controlling question of law as to which there is

substantial ground for difference of opinion. . . ." 28 U.S.C. § 1292(b). No such controlling question is presented by the Orders at issue here.

Plaintiffs assert that they are entitled to collaterally attack a class action settlement, such as the *Horton* settlement, in the forum of their choice, and that this is the controlling question of law involved in this case. Plaintiffs wish to assert that they are not members of the class, that the class was improperly certified, and that they were not adequately represented in the Florida action. Plaintiffs argue that I ignored precedent which permits such collateral attacks on class action settlements to be made in the forum of Plaintiffs' choice. Indeed, I have the authority to reach such questions. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989). In my view, however, this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and my decision to transfer is not a ruling as a matter of law that no such authority exists. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995). Thus, the decision in this case was discretionary, and not a question of controlling law.

If, in fact, my ruling had been made on the basis that I lacked jurisdiction to address the adequacy of the class settlement, then Plaintiffs would have a point. Here, however, I determined that a discretionary transfer was warranted pursuant to 28 U.S.C. § 1404(a), and that, although I could address the questions presented, it would be more appropriate for the Florida court to do so. If my power to transfer were questioned, then perhaps certification would be appropriate. *See*, *Wilkins v. Erickson*, 484 F.2d 969 (8th Cir. 1973) (when issue is power of court to transfer, as opposed to discretionary ruling, then certification would be appropriate). Thus, there is no controlling question of law involved in this matter. Rather, there is a discretionary ruling that does not involve a controlling question of law.

Therefore, this **4th** day of December, 1996, it is **ORDERED** that the Motions of Plaintiffs Coulter, Rostek and Corriere to Amend

Interlocutory Order Granting Defendant's Motion to Transfer (Docket #: 23 at No. 96-833 and Docket #: 105 at #s: 94-629 and 94-1108) are **DENIED.**

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

[Names and addresses of counsel omitted in printing.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FAIRNESS OF CLASS ACTION SETTLEMENT

Before the Court is a joint motion by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife"), for approval of the proposed settlement in this action. (Docket No. 35.) This motion has been fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full day hearing on July 18, 1994.

Based on these submissions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

1. On November 1, 1993, the named plaintiffs filed their Class Action Complaint and Jury Demand. An amended complaint followed on November 19, 1993, with a second amended complaint on February 14, 1994 (the "*Horton* Complaint"). The *Horton* Complaint asserted claims based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), the Florida

Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.103(1), and the common law of fiduciary duty and fraud. The Complaint sought rescission, restitution, treble damages, punitive damages and attorneys' fees and costs.

2. The central claim in this lawsuit is that certain agents of MetLife allegedly made oral or written sales solicitations to sell whole life insurance as retirement and/or other savings plans or vehicles without fully disclosing that the product sold was life insurance.

3. The lawsuit was filed in the wake of inquiries into similar allegations by the insurance departments of Florida and other states. (*See* Affidavit of Alan Neiditch, sworn to June 27, 1994, ¶¶ 3-5, Docket No. 111.)

Preliminary Court Orders

4. Before any responsive pleadings were filed, the parties entered into a Settlement Agreement on April 4, 1994 (the "Agreement").[1]

5. The proposed settlement offers settlement class members whose whole life policies are still in force the choice of:

- a cash refund of all premiums paid by the settlement class member (less any amounts already paid to him or her by MetLife, such as loans or refunds) plus interest at a rate based on MetLife annuity interest rates (including the effect of compounding);
- an annuity funded in the amount of all premiums paid (less any amounts already paid by MetLife, such as loans or refunds) plus interest; or
- the continuation of their policies.

To class members whose policies are no longer in force, the proposed settlement offers the cash refund. (Agreement ¶¶ 5(b), 5(d), 5(o), 6.)

---

1. The Settlement Agreement is attached as Exhibit 1 to the parties' joint motion. It is cited herein as "Agreement" followed by the relevant paragraph number.

6. The proposed settlement also provides that MetLife would pay fees and expenses of settlement class counsel as provided in the Agreement, over and above any amount paid to settlement class members, as well as the administrative costs of implementing the settlement, including the fees of the Court appointed Claims Administrator and the costs of producing and mailing the individual notice and publishing the publication notice. (Agreement ¶¶ 17-18.)

7. On April 12, 1994, plaintiffs and MetLife filed a joint motion seeking an Order certifying a settlement class, appointing settlement class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing date for the Court to evaluate the settlement.

8. After hearing argument on the motion on April 19, 1994, the court issued an Order on April 22, 1994 (Docket No. 48), *inter alia*,

(a) certifying as a class under Fed. R. Civ. P. 23(b)(3), solely for the purpose of settlement:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993;

(b) designating settlement class counsel;

(c) preliminarily approving the settlement as sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement;

(d) scheduling a full hearing on the settlement;

(e) approving the form of notice and accompanying claim form;

(f) approving individual notice to an overly inclusive group of potential settlement class members consisting of: (i) all whole life policyholders who purchased from the Rick Urso & Associates sales office (the "Tampa office") between January 1, 1988 and October 31, 1993; and (ii) certain policyholders who purchased from MetLife's other offices between January 1, 1990 and October 31, 1993, and who were identified statistically as likely to be class members, or were identified empirically (through a survey of MetLife's sales offices and a review of sales literature) as likely to be class members, or complained of sales solicitations similar to those alleged in the *Horton* Complaint; and

(g) approving publication notice in 10 daily newspapers throughout the United States and in two monthly nursing magazines.

9. On April 22, 1994, the Court issued an Order, with the consent of MetLife and settlement class counsel, permitting intervention by the Florida Insurance Commissioner. (Docket No. 47.)

10. On June 14, 1994, the Court issued an Order, pursuant to Fed. R. Evid. 706, appointing an insurance expert for the purpose of analyzing the proposed settlement to assist the Court in evaluating the settlement. (Docket No. 96.) The expert provided consultation to the Court without the filing of a formal report in the court record.

Notice and Response

11. The individual notice was written in plain English and included (i) the caption, (ii) a description of the litigation, (iii) a description of the settlement class, (iv) identification of counsel for the class, (v) notification of the option to enter an appearance personally or through other counsel and the deadline for doing so, (vi) a description of the settlement, (vii) the procedure for filing objections, (viii) the hearing date, (ix) the procedure for filing requests for exclusion and the deadline for doing so, (x) the consequences of filing an exclusion request, (xi) the consequences of remaining in the settlement class, (xii) the consequences if the settlement is or is not

approved by the Court, (xiii) a description of MetLife's responsibility for attorneys' fees and (xiv) the procedure for obtaining additional information. Potential settlement class members with in force policies, who might have been concerned about their policies as a result of the notice, also received a letter from MetLife assuring them that their policies are valid and that MetLife is financially secure. (Ex. A to the Affidavit of G. Peter Buchband, sworn to July 18, 1994, Docket No. 149.)

12. The Proof of Claim form was written in plain English. It required those settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.) In addition, the Proof of Claim form (i) required a notarized signature, (ii) asked which settlement option the class member wished to elect, (iii) requested surrender of the policy and (iv) contained a release.

13. The publication notice contained (i) a description of the litigation and the settlement class, (ii) a description of the settlement, (iii) procedures for filing a request for exclusion and the deadline for doing so, (iv) the hearing date and (v) the procedures for obtaining further information and a Proof of Claim.

14. The group proposed by the parties and approved by the Court to receive individual notice is likely to include the vast majority of settlement class members. The methodology for identifying this group was necessary because there is no direct way to identify

policyholders based on the type of solicitation they received. (Affidavit of Anthony Amodeo, sworn to April 12, 1994, ¶ 5, Docket No. 40.) This methodology was the best means of identifying settlement class members through reasonable efforts and was developed in consultation with, and accepted by, both class counsel and insurance regulators. (Transcript, R. Parry at 98-99; T. Tew at 101-03; Neiditch Aff. ¶ 9.)

15. Individual notice was sent to approximately 71,000 potential settlement class members by the Court appointed Claims Administrator. Of these, a total of 730 (1.0%) were returned undeliverable. (Buchband Aff. ¶¶ 4, 23.)

16. Notices were published in the May 9, 1994 and the May 14, 1994 issues of *USA Today*, *New York Daily News*, *Los Angeles Times*, *Chicago Sun-Times*, *Philadelphia Inquirer*, *Pittsburgh Post Gazette*, *Miami Herald*, *Atlanta Journal and Constitution*, *Dallas Morning News*, *Houston Chronicle*, and *Tampa Tribune*; in the May 9, 1994 issue of the *Birmingham News*; and in the June issues of the *American Journal of Nursing* and *RN Magazine*. These publications on the dates published had a circulation of over 7 million. (*See* Affidavits of Charles Alexander, sworn to July 1 & 18, 1994, Docket Nos. 145 and 149.)

17. As of the hearing date, the Claims Administrator had received a total of 20,706 timely claim forms (29.2% of claim forms mailed) and 513 timely requests for exclusion (0.7% of individual notices mailed). (Buchband Aff. ¶¶ 20, 21, 23.) The Court has directed the parties to meet and agree on the treatment of late filings and, if no agreement can be reached, to submit these issues to the Court by motion.

18. Only two settlement class members filed timely objections to the settlement.

19. In addition, certain other persons attempted to appear and object. However, their motions were denied as follows:

(a) The motion to intervene (Docket No. 64) by certain former MetLife sales managers — Julio Gonzalez-Roel, Kevin P.

McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes ("the former sales managers") — was denied.

(b) The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters") was denied. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection was untimely, although this untimeliness does not affect their status as settlement class members. Pursuant to this Court's April 22, 1994 Order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.)

(c) The motion filed by the named plaintiffs (Docket No. 106) to dismiss the notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon ("Daxon"), and by Daniel Richard Urso ("Urso") was granted. Specifically, Daxon's notice of intention to appear and object (Docket No. 89) was dismissed for lack of standing. Urso's notice of intention to appear and object (Docket No. 94) was dismissed for lack of standing. The former sales managers' notice of intention to appear and object (Docket No. 58) was dismissed by stipulation that the former sales managers are not settlement class members.

(*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Final Settlement Hearing

20. On July 18, 1994, the Court conducted a full day hearing on the fairness of the settlement and related issues, which the parties had fully briefed.

21. At the hearing, the Court heard and considered the objections of the two settlement class members who objected in a timely fashion, the former sales managers, the Coulters, Urso and Daxon before disposing of the motions as described above.

22. At the hearing, class counsel called as a witness David Donaldson, an experienced plaintiffs' class action lawyer from the Ritchie & Rediker firm in Birmingham, Alabama, who testified that the settlement was fair and that the form of individual notice was clear and easily understood. (Transcript, Donaldson at 136-38.) Class counsel had previously filed an affidavit of Mr. Donaldson's partner, David Guin (Docket No. 143), reflecting his view that the settlement was fair.

23. At the hearing, MetLife called as a witness Daniel J. McCarthy, a consulting actuary with the firm of Milliman & Robertson, experienced in life insurance matters, who explained features of the settlement and testified that the settlement, including each of the settlement options as well as the interest rate, was fair and that the individual notice was likely to reach the vast majority of the settlement class. (Transcript, McCarthy at 177-94.)

24. MetLife has committed and confirmed at the July 18, 1994 hearing (*see* Transcript at 200) that it will either (i) provide Restitution (as defined in the Settlement Agreement) to class members who withdrew from the Florida Prepaid Tuition Program or, at the option of the settlement class member, (ii) to the extent permitted by the Florida Prepaid Tuition Program, obtain those persons' reinstatement in that Program.

Facts Relating to the Fairness of the Settlement

25. The settlement offers full restitution to settlement class members. The settlement is at the top of the range of possible compensatory damages. It is not discounted to reflect the risks, delays or costs of litigation.

26. The following are issues that could present obstacles to plaintiffs' success at trial (which obstacles might or might not be overcome) if this matter were to proceed in litigation:

- establishing the elements necessary to obtain class certification, if this case were litigated rather than settled;

- proving that any settlement class member was unaware that he or she had purchased life insurance in view of written disclosures made to and acknowledgements signed by settlement class members;
- overcoming the defense that their RICO claims are precluded by the McCarran-Ferguson Act;
- overcoming the defense that their Florida Civil Remedies for Criminal Practices Act claims are precluded by the Florida Unfair Insurance Trade Practices Act;
- establishing the necessary elements of their RICO, Florida Civil Remedies for Criminal Practices Act and common law claims; and
- establishing that settlement class members' claims are timely under applicable statutes of limitations.

27. This action, if litigated, would be complex, expensive and time-consuming.

28. Negotiations leading to the settlement lasted several months and, at times, were acrimonious. (*See* Affidavit of Lorna G. Schofield, sworn to June 27, 1994, Docket No. 117; Affidavits of Ron Parry, sworn to April 19, 1994, Docket No. 45, and June 28, 1994, Docket No. 109, Ex. C; Affidavit of Judy S. Hoyer, sworn to April 7, 1994, Docket No. 109, Ex. D.) There is no evidence of collusion.

29. More than 40 state insurance regulators have approved the substance of the proposed settlement, including the settlement amount and the methods for identifying those persons who received individual notice. (Neiditch Aff. ¶¶ 2, 8-9.)

CONCLUSIONS OF LAW

Subject Matter Jurisdiction

30. The Court has jurisdiction over the federal claims under 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

31. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

32. In arguing the weaknesses in plaintiffs' case, MetLife has asserted that the McCarran-Ferguson Act precludes plaintiffs' RICO claims. Plaintiffs have disputed this issue. In either event, the Court has subject matter jurisdiction. Even if MetLife is correct, the Court has subject matter jurisdiction because the federal claims alleged in this Complaint are not devoid of merit on their face. *See Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405, 408 (11th Cir. 1986). Moreover, successfully asserting the McCarran-Ferguson Act as an affirmative defense would result in the dismissal of plaintiffs' RICO claims *on the merits* for failure to state a claim, and not for lack of subject-matter jurisdiction. *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236-37 (2d Cir. 1975).

33. The Court also has determined to exercise its supplemental jurisdiction over state law claims in this case in the interests of judicial economy, convenience, and fairness to litigants, particularly the more than 20,000 who have filed Proof of Claim forms and indicated their desire to accept the restitution set forth in the Settlement Agreement.

Class Certification

34. The certified settlement class is sufficient under Fed. R. Civ. P. 23 for settlement purposes. The standards of Rule 23 for class certification are more easily met in the context of settlement than in the context of contested litigation. *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-158 (S.D. Ohio 1992); *Dalkon Shield Claimants' Comm. v. Aetna Cas. & Sur. Co. (In re A.H.*

Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Adequacy of Notice

35. Elements of Rule 23(c)(2) notice (for class certification) are combined with elements of Rule 23(e) notice (for notice of settlement or dismissal) where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action. *Hitt v. Nissan Motor Co. (In re Nissan Motor Corp. Antitrust Litig.)*, 552 F.2d 1088 (5th Cir. 1977).

36. The notices to potential class members provided all the information material to making an informed and intelligent decision whether to participate in the settlement class and the settlement. *See id.* at 1105. This notice fairly and reasonably advised potential class members of their rights under the settlement, and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23.

37. The methodology used to identify potential class members to receive individual notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Rule 23 does not require actual notice to each and every possible class member where, as here, a precise list of actual settlement class members could not be created. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). Supplementing individual notice with publication notice represents an appropriate balance between protecting class members and making Rule 23 workable. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *In re Agent Orange*, 818 F.2d at 168-69; *Manual for Complex Litigation, Second* § 30.21 at 223 (1986). The Court concludes that the individual notice and publication notice collectively constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing, and thereby satisfied the requirements of Rule 23(c)(2) (as well as Rule 23(e)).

Objections

38. Two settlement class members filed timely objections to the settlement with the Court. They asserted, respectively, that (a) the settlement should provide for punitive damages, and (b) the annuity is insufficient settlement relief. These objections were considered and are rejected because the settlement provides 100% of compensatory damages, and punitive and treble damages are not to be considered in determining the upper range of possible recovery for settlement purposes. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993); *Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

39. The objections raised by the Coulters, although not timely filed, were considered and rejected. The Coulters' objection merely refers back to their motion to intervene and supporting arguments, which were briefed, argued and rejected. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

40. The Court considered the objections raised by the former sales managers and Daxon, even though they are not class members and lack standing to raise the objections. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.) Certain of those objections are antithetical to the interests of the settlement class and are rejected.

41. The remaining objections of the former sales managers and Daxon are as follows:

(a) They objected that the notice does not adequately warn class members of the risks of surrendering their whole life insurance policies and claiming a full refund. This objection is rejected. The notice clearly presented the settlement options and warned policyholders to consider carefully whether cancellation of their life insurance was in their best interests. Such notice is legally sufficient.

Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1974) (fact that notices do not fully explore options is immaterial because class members "are not expected to rely upon the notices as a complete source of settlement information"), *cert. denied*, 423 U.S. 864 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1522 (N.D. Ala. 1991) (denying movants' claim that settlement notice was misleading and/or incomplete because it allegedly did not explain effect of settlement provisions on policyholders), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993). The Court concludes that additional information about settlement options would have made the notice lengthy, confusing and would have been inappropriate, particularly in light of the nature of the allegations asserted in this action. *See In re Farmers Group Stock Options Litig.*, [1991-1992] Fed. Sec. L. Rep. (CCH) ¶ 96,522, at 92,378 (E.D. Pa. Dec. 19, 1991) (settlement notice must "be neutral in its description of class member options"; fuller details of settlement options would have "counterproductively engendered confusion" given the speculative nature of information, especially where class members presumably could consult with their own brokers if they had questions regarding settlement).

(b) The former sales managers and Daxon objected that the release as set forth in the proof of claim is overly broad in that it could cover derivative claims. This objection is rejected. Derivative claims belong to and are brought on behalf of the corporation, and not any individual. *See, e.g.*, Fed. R. Civ. P. 23.1. Derivative claims on behalf of the company relating to the sales solicitations at issue have already been asserted. (*See, e.g.*, Derivative Complaint, Ex. B to the former sales managers' Objection, Docket No. 35.) If those claims result in a recovery in favor of the company, those funds will be paid to the company and not to any individual. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) ("Any relief obtained [in a derivative action] belongs to the corporation only"), *cert. denied*, 469 U.S. 858 (1984); *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1315 n.1 (W.D. Pa. 1986) ("Any recovery in a derivative action belongs to the corporation," citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

(c) The former sales managers and Daxon objected that the settlement class includes either too many or too few potential claimants. This objection is rejected. No precise list of settlement class members can be compiled because the parties cannot determine which policyholders received (and relied on) allegedly misleading sales solicitations. (Amodeo Aff. ¶ 5.) Individual notice was provided to an overly broad group of potential settlement class members and was supplemented by broad publication notice. As stated above, the Court has concluded that this notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Notice to a greatly overinclusive group of all MetLife whole life policyholders is unwarranted and impractical because the vast majority of those persons probably knew they were buying life insurance and were not misled by allegedly improper sales solicitations. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (court did not require individual notice to every Vietnam veteran in order to reach a class consisting of such veterans who had been exposed to Agent Orange).

(d) The former sales managers and Daxon objected that the settlement is collusive. This objection is rejected as baseless. No evidence of collusion exists.

(e) The former sales managers objected that the class definition is inconsistent with the Proof of Claim form in that the latter includes a requirement that a class member certify that he or she had been misled, even though the class definition does not do so. This objection is rejected because the settlement class is properly defined in objective terms. Class membership should not depend on a determination of the merits of each potential class member's claims. *Manual for Complex Litigation, Second* § 30.14 (1986). Moreover, the settlement class was certified for the sole purpose of resolving the claims asserted in the Complaint, which in substance allege that policyholders were misled in the purchase of their whole life insurance policies. Thus, class members who sought to make a claim were appropriately required to assert that they were misled in the

purchase of their policy and did not understand that they were buying a life insurance policy at the time they purchased it in order to participate in the settlement.

42. Urso asserted substantially the same objection concerning the certification required in the Proof of Claim form. The Court has considered and rejects the objection for the reasons stated above, even though Urso is not a settlement class member and therefore lacks standing to raise the objection. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Fairness of Settlement

43. There are six factors to consider in determining whether a class action settlement is fair and adequate. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977). These factors support approval of the settlement in this case.

44. (First factor:) The risk that plaintiffs would lose on the merits at trial supports approval of the settlement. *See Bennett*, 737 F.2d at 986.

45. (Second and third factors:) The amount of the settlement, which here is at the upper end of the range of possible recovery, supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

46. (Fourth factor:) The prospect of complicated, expensive and time-consuming litigation if the case were not settled supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

47. (Fifth factor:) The virtual lack of objections from settlement class members, and the lack of substance of objections that were made, support approval of the settlement. *Bennett*, 737 F.2d at 986, 988 & n.10; *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180

(5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1212 (M.D. Ga. 1988).

48. (Sixth factor:) The stage of the proceedings at which the settlement was achieved, prior to formal discovery, does not weigh against approval of the settlement. *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. April 1981); *Cotton*, 559 F.2d at 1332. Here the settlement was not discounted to reflect the risk of loss, and class counsel had access to a great deal of other information, obtained from such sources as extensive press reports, their own clients, and the report of Thomas Tew on behalf of the Florida Commissioner of Insurance. (*See generally* Parry Aff. ¶ 12, Docket No. 109.)

49. The absence of evidence that the settlement is the product of anything other than arm's-length, non-collusive negotiations supports approval of the settlement. *Cotton*, 559 F.2d at 1330; *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Warren*, 693 F. Supp. at 1055.

50. The Court has given weight to the views of counsel who negotiated the settlement as to the merits of the settlement. *See Cotton*, 559 F.2d at 1330; *Ressler v. Jacobson*, 822 F. Supp. 1551, 1552 (M.D. Fla. 1992). The Court has also considered the views of experts who have examined the settlement and found it to be fair and adequate.

51. In addition, the Court has considered and accorded great weight to the approval given to the restitution plan embodied in the settlement by more than 40 independent state insurance regulators around the country as evidence that the settlement is fair and was the product of arm's-length, non-collusive negotiations. *See Marshall*, 550 F.2d at 1178; *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314, 1318 (N.D. Ill. 1993).

52. The settlement is fair, adequate and reasonable and not the product of collusion between the parties.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER APPROVING
CLASS ACTION SETTLEMENT

Before the Court is a joint motion (Docket No. 35) by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife") for approval of a proposed settlement pertaining to a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993,

which was certified by Order of this Court dated April 22, 1994, under Rule 23(b)(3), Fed. R. Civ. P., solely for the purpose of settlement. The joint motion for approval of the settlement was fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full-day hearing on July 18, 1994.

Based on these submissions, and the Court's Findings of Fact and Conclusions of Law Regarding Fairness of Class Action Settlement rendered herewith,

IT IS HEREBY ORDERED that:

1. The settlement as evidenced by the parties' Settlement Agreement, dated April 4, 1994, is hereby determined to be fair, reasonable and adequate, and the parties are directed to comply with and consummate its terms.

2. Notice of the settlement to potential settlement class members, given in the form and manner provided in this Court's Order of April 22, 1994 (Docket No. 48), is hereby determined to have constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing. This notice fairly and reasonably advised potential class members of their rights under the settlement and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23 of the Federal Rules of Civil Procedure.

3. The Proof of Claim form previously approved by the Court fairly and reasonably advised potential class members of their options if they wished to participate in the settlement and in a manner that neither encouraged nor discouraged potential class members from electing any particular settlement alternative. In addition, the Proof of Claim form fairly and effectively solicited information needed to determine whether persons submitting the form were eligible for settlement class relief.

4. The Settlement Agreement is and shall be binding on all settlement class members.

5. MetLife, its past, present and future officers, directors, employees, agents, representatives, and its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them ("MetLife and its Affiliates"), are forever

discharged from any and all causes of action, claims, damages, equitable and legal relief, demands or rights that *(i)* have been or could have been asserted by Sherry Horton, Joyce Armbruster or Deborah K. Spamer (the "Named Plaintiffs"), other settlement class members or the settlement class in this action or *(ii)* have been, could have been, may be or could be alleged or asserted by any of the Named Plaintiffs, other settlement class members or the settlement class against MetLife and its Affiliates, or any of them, now or hereafter, on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted, described, set forth or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint ("Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designated by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys' fees, costs or disbursements incurred by any person or entity in connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies, *provided, however*, that nothing herein is intended to bar any action to enforce the Settlement Agreement in accordance with its terms.

6. All claims of plaintiffs and settlement class members in this action are dismissed on the merits and with prejudice, without costs to any party except as provided in the Settlement Agreement.

7. The Court expressly retains jurisdiction over the administration of the settlement for the purposes of (*i*) supervising the Restitution, as defined in the Settlement Agreement and as stipulated by MetLife at the July 18, 1994 hearing with respect to Settlement Class Members who withdrew from the Florida Prepaid Tuition Program; (*ii*) ruling upon any application by settlement class counsel for an award of attorneys' fees; (*iii*) otherwise enforcing the terms and conditions of the Settlement Agreement and resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise out of the Settlement Agreement, Final Judgment or this Order;

(*iv*) entering such additional orders as may be appropriate or necessary to protect or effectuate the Court's Order and Final Judgment approving the terms of the Settlement Agreement and dismissing claims thereunder, and to ensure the fair and orderly administration of this settlement; and (*v*) any other appropriate or necessary purpose, and the Court reserves the power to protect and effectuate this Order and Final Judgment and to enter such orders as may be necessary in aid of its continuing jurisdiction.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

FINAL JUDGMENT

WHEREAS plaintiffs and defendant entered into an agreement for the settlement of this class action, dated April 4, 1994; and

WHEREAS the Court granted certification of a settlement class, and ordered individual and publication notice to potential class members that provided such potential class members an opportunity to exclude themselves from or object to the settlement, on April 22, 1994; and

WHEREAS the parties have jointly moved for final approval of the settlement and for dismissal of the action; and

WHEREAS the parties' motion was briefed fully, supported by affidavits, testimony and documents, and was the subject of a full day hearing before this Court on July 18, 1994, at which settlement class members and others were afforded an opportunity to object to the settlement; and

WHEREAS the Court has found the settlement to be a fair resolution of this class action, has entered findings of fact and conclusions of law to that effect, and has entered an order approving

the settlement and dismissing the settlement class members' claims; therefore,

IT IS HEREBY ADJUDGED AND DECREED THAT:

1. The settlement of this class action on the terms set forth in the parties' Settlement Agreement is approved, for the reasons set forth in this Court's Order Approving Class Action Settlement, dated 10/25/94, and its Findings of Fact and Conclusions of Law, dated 10/25/94.

2. The claims in this action are dismissed on the merits and with prejudice on the terms set forth in the parties' Settlement Agreement, without costs to any party except as provided therein.

3. The Court will retain jurisdiction over this action for the purposes set forth in this Court's Order Approving Class Action Settlement, dated 10/25/94.

4. There being no just reason for delay, this document shall constitute the final judgment on these claims for the purposes of Fed. R. Civ. P. 54(b).

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER

The following class members filed requests for enlargement of time within which to seek exclusion from the class ("requests"): John Romano (Doc. 119B), Terrance J. McDonnell (Doc. 119C), Joann Kablach (Doc. 119D), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), Deborah R. Myers (Doc. Doc. 159), Darrin L. Johns (Doc. 160), Anissa and Ronald Coulter (Doc. 174), Jeanne Yokel (Doc. 175), Eric Maharg (Doc. 176), and Albert Darren Wise (Doc. 177) (collectively, the "applicants").

Each of the requests were filed by attorney Kenneth Behrend. The applicants seek to exclude themselves from the class even though they failed to comply with the provisions of the settlement agreement (Doc. 35) and applicable order (Doc. 48). Both the agreement and order require that class members electing exclusion send to the Claims Administrator a "request for exclusion" postmarked on or before June 13, 1994.

None of the applicants questions the need for a deadline or the appropriateness of the June 13, 1994, deadline. The applicants

suggest simply that they should be provided additional time to exclude themselves because they have shown "excusable neglect" under Rule 6(b)(2), Federal Rules of Civil Procedure. The excusable neglect standard applies to the requests because they were filed after the expiration of time for seeking exclusion.

The determination of whether the time for exclusion should be enlarged is left to the district court's sound discretion. *See*, *e.g.*, *Davidson v. Keenan*, 740 F.2d 129 (2d Cir. 1984). "To sustain a finding of excusable neglect, the party seeking the enlargement of time bears the burden of proving both *good faith* and a *reasonable basis* for not complying within the specified period." *Breslow v. Prudential-Bache Props., Inc.*, 1994 WL 478611, *3 (N.D. Ill. Sept. 1, 1994) (emphasis added). The class action deadline serves an important function and should not be disturbed casually. *Id.* For the following reasons, the applicants' requests are **DENIED**.[1]

Before addressing the individual requests, considering the prejudice, if any, the respective parties may suffer by denying the requested relief is worthwhile. In its response (Doc. 190), Metlife offers the applicants the same settlement options that were available initially to them even though the time for submitting a completed

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1. This ruling is based on the merits. In its response (Doc. 190), Metlife seeks denial of the requests based, in part, on procedural grounds. Metlife asserts that the "requests" are fatally defective because they are not styled as "motions." Without citing to any case authority, Metlife suggests that, to give effect to the difference between Rule 6(b)(1), which allows an enlargement of time based simply on a request, and Rule 6(b)(2), which requires a motion, the applicants' papers must be styled as motions. Here, the difference is inconsequential. The parties have been provided an opportunity to respond to the requests regardless of how they are designated. Accordingly, Metlife's procedural argument is unavailing. For purposes of this order, the applicants' requests are construed as motions and denied on the merits. A procedural basis for denying the requests is the applicants' failure to comply with Local Rule 3.01(g). However, in light of Metlife's response (Doc. 190), requiring the parties to confer in good faith appears futile. For this reason, the requests are considered despite the applicants' non-compliance with the Local Rules.

proof of claim form has passed.[2] In a separate order, the terms of the settlement agreement, including the cash refund and annuity options, are held fair, reasonable, adequate, and in the best interest of the class members. Therefore, precluding the applicants from opting out of the class at this time will cause them no cognizable prejudice. In fact, many of the applicants request a cash refund as alternative relief.

On the other hand, allowing class exclusions at this late stage will cause severe prejudice to Metlife. The settlement agreement reflects the parties bargained-for expectations. The opt-out deadline is a material provision of the settlement agreement. That deadline provided Metlife with an opportunity to determine the potential number of claims that may remain unresolved and to evaluate the objections to the proposed settlement. Prior to the fairness hearing, Metlife had the ability to assess that information and, pursuant to the terms of the settlement agreement, to terminate the proposed settlement. Metlife no longer has the right to consider the applicants' claims and decide whether to terminate the agreement.

From Metlife's perspective, a bargained-for purpose of the $76 million agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Allowing untimely exclusions without sufficient cause and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

The first group of applicants to be considered are those class members who allege that they failed to submit their requests for exclusion on or before June 13, 1994, because the proof of claim form is allegedly confusing. Their argument is without merit. The class notice, which accompanied the claim form and was approved by this Court, states clearly that a class member, to be excluded from the class, must submit to the Claims Administrator a request for exclusion

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2. Metlife is now bound to offer the applicants the option of either the cash refund or the annuity. Upon entry of this order, the applicants may contact counsel for Metlife to discuss submitting a completed claim form and electing one of the options.

postmarked on or before June 13, 1994. The claim form, which is equally clear, addresses the procedure for electing the cash refund and annuity options, and not the procedure for opting-out.

As a matter of law, misunderstanding the language of a court-approved class notice and claim form fails to constitute excusable neglect for purposes of Rule 6(b)(2). *See In re VMS Secs. Litig.*, 1992 WL 203832, *3-4 (N.D. Ill. Aug. 13, 1992). If class members needed additional information, they could have contacted class counsel or the Claims Administrator. The class notice specifically informed the class members that those resources were available for free. Alternatively, class members who were unable to understand the class notice or claim form could have consulted with their attorney. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994).

Accordingly, the requests for enlargement filed by class members Terrance J. McDonnell (Doc. 119C), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), and Albert Darren Wise (Doc. 177) fail to establish excusable neglect and are denied. Except for Wise, each of these applicants requests the cash refund as alternative relief. Inasmuch as Metlife must offer either the cash refund or the annuity, the applicants will be receiving, in part, their requested relief.

Class members Deborah R. Myers and Darrin L. Johns filed their requests for enlargement (Docs. 159 and 160, respectively) on August 8, 1994. In their requests, both Myers and Johns assert that they met with their attorney, Kenneth Behrend, well before the June 13, 1994, deadline and expressed to him their desire to be excluded from the class. Due to some undefined "clerical error," their attorney did not submit requests for exclusion to the Claims Administrator.

The requests for enlargement filed by Myers and Johns fail to establish excusable neglect. Their assertions are not supported by an affidavit or some other admissible evidence. Additionally, assuming the assertions are true, inadvertence of counsel generally fails to constitute excusable neglect. *See, e.g., Davidson v. Keenan*,

740 F.2d 129, 132 (2d Cir. 1984); *Jones v. Siegfried Constr. Co., Inc.*, 105 F.R.D. 491, 492 (W.D.N.Y. 1984), *aff'd*, 792 F.2d 136 (2d Cir.), *cert. den. sub nom. Jones v. Niagara Frontier Transp. Auth.*, 479 U.S. 932, 107 S. Ct. 404 (1986). Myers and John explain neither the alleged "clerical error" nor the eight-week period that lapsed before attempting to correct the error. Accordingly, the requests for enlargement filed by Myers (Doc. 159) and Johns (Doc. 160) are denied.

Joann Kablach's request (Doc. 119D) fails to show excusable neglect. Kablach avers that she was unable to submit a timely request for exclusion because she did not receive a class notice and claim form packet until June 17, 1994. However, Kablach fails to mention that she did not request a packet until June 16, 1994. *See* ¶ 6(c) of Goldsmith Affidavit (Doc. 191). Conspicuously missing from Kablach's request is the date she met with her attorney and learned about the June 13, 1994, deadline. For these reasons, Kablach's request (Doc. 119D) is denied.

In his unverified request (Doc. 176), Eric Maharg states that he failed to submit a timely request for exclusion because he reasonably relied (1) on a form letter and pamphlet that he received from his Metlife sales agent and (2) on alleged representations made by his Metlife sales agent in relation to the pamphlet.

The form letter, dated March 31, 1994, discussed simply the availability of "up-to-date" information regarding Maharg's policy (*e.g.*, current cash value). The pamphlet prepared my Metlife advises policyholders that the controversy over sales practices would not affect the financial security of the company's products. The pamphlet also discusses Metlife's response to investigations by state regulators and the company's financial strength. The purported representation made by Metlife's sales agent allegedly includes assurances that Maharg's policy is unrelated to the policies sold in Florida and suggests that he refrain from taking action in the Florida proceeding.

Maharg's claim of reasonable reliance is without merit.[3] Reliance on a defendant's account agent (for purposes pertinent to this case) is unreasonable and fails to constitute excusable neglect. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 52 (7th Cir. 1994). Moreover, neither the March 31 letter, the accompanying pamphlet, nor the ensuing conversation with the Metlife sales agent could have possibly suggested to Maharg that he ignore the June 13, 1994, deadline to exclude himself from the class. The parties did not enter the settlement agreement until April 6, 1994. More important, the settlement class was not certified and the June 13, 1994, deadline was not established until April 22, 1994. Further, nothing in the March 31 letter or pamphlet even remotely suggests that Maharg refrain from excluding himself from this class action lawsuit.

Assuming that the Metlife sales agent suggested to Maharg that he refrain from participating in the Florida proceedings described in the pamphlet, that suggestion is of no consequence. The proceedings described in the pamphlet are a regulatory investigation conducted by the Florida Insurance Department, an in-house investigation conducted by Metlife, internal changes made by Metlife as a result of its in-house investigation, and a program implemented voluntarily by Metlife to provide restitution to policyholders who purchased whole life insurance from the Tampa office. Maharg could not have participated in these proceedings. The Metlife sales agent has no recollection of telling Maharg or any other policyholder that they should refrain from participating in this class action lawsuit. *See* Affidavit of Mathew A. Badger (Doc. 203).

Finally, Maharg purportedly learned about the June 13, 1994, deadline in August when he consulted with attorney Kenneth Behrend. If Maharg could consult with an attorney in August, he could have consulted with an attorney before the June 13 deadline. Maharg should have consulted a competent, independent professional with his

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3. Because Maharg fails to show reasonable reliance, the remaining two elements of equitable estoppel (*i.e.*, misrepresentation, detrimental reliance) need not be considered.

legal questions. He should not have relied (assuming he did) on his Metlife sales agent, the person with whom he allegedly had a dispute.

Maharg has not and cannot assert that he was unaware of this class action and the settlement options. The Claims Administrator sent Maharg a class notice. *See* Affidavit of G. Peter Buchband (Doc. 202); Affidavit of Lawrence A. Vranka (Doc. 201). Whether Maharg actually received the notice is irrelevant so long as Metlife complied with the court-approved notice procedures. *See In re VMS Secs. Litig.*, 1994 WL 386397, *3 (N.D. Ill. July 20, 1994). Even if Maharg's unsworn statement that he never received the class notice is true, he was on constructive notice of the pending class action and proposed settlement pursuant to the published notice contained in newspapers circulated throughout Pennsylvania. For these reasons, Eric Maharg's request for enlargement of time within which to exclude himself from the class (Doc. 174) is denied.

John Romano's request (Doc. 119B) is denied as well. Romano states that his attorney, Kenneth Behrend, posted his request for exclusion on June 13, 1994, but that it was not postmarked until June 14, 1994. However, according to a sworn admission made on Romano's behalf, this statement is untrue. On June 13, 1994, Mr. Behrend attempted to exclude Mary Romano and not John Romano. *See* Affidavit of Lorrie Wesolosky (Doc. 119A). The Claims Administrator never received a request for exclusion from John Romano. The Claims Administrator did receive from Mary Romano a request postmarked on June 14, 1994. *See* ¶ 4(b) of Affidavit of Linda Goldsmith (Doc. 191). Accordingly, because John Romano never submitted a request for exclusion as he suggests, his request for enlargement (Doc. 119B) is denied. Mary Romano, who made an unsuccessful attempt to exclude herself, has not sought any relief.

Anissa and Ronald Coulter request an enlargement of time within which to exclude themselves from the class (Doc. 174). On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. The Coulters do not suggest excusable neglect as a basis for seeking permission to submit an untimely exclusion. Instead, they argue that they should be excluded from the class because they

manifested their intent to be excluded when they (1) filed their Pennsylvania action on March 24, 1994, and (2) filed their motion for intervention (Doc. 77) in this action on May 23, 1994. To the extent that the Coulters suggest excusable neglect, they assert that they should be relieved from the June 13, 1994, deadline because they never received a class notice.

As Metlife states in its response, "Of all the positions taken by the various applicants, the least explicable is that of Ronald and Anissa Coulter." *See* p. 14 of Metlife response (Doc. 206). In their motion for intervention (Doc. 77), the Coulters sought to exclude all Pennsylvania residents from this action or to have their attorney appointed as counsel for the Pennsylvania members of the settlement class. As class members, the Coulters also filed a notice of intention to appear and objections to the proposed settlement (Doc. 119).

"The pendency of an individual action does not excuse a class member from filing a valid request for exclusion." *In re VMS Secs. Litig.*, 1992 WL 203832, *3 (N.D. Ill. August 13, 1992). Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (*i.e.*, exclusion of all Pennsylvania residents or appointment of their attorney as class counsel).[4] However, they cannot have it both ways. The Coulters had a choice to opt out or participate. They chose to participate. The parties were forced to respond to the numerous papers that the Coulters filed in this action. A tactical decision in litigation does not constitute excusable neglect. *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990). The Coulters will not be relieved from the consequence of their failed plan. They received the benefits of retaining their class membership (*i.e.*, objecting to the settlement and participating in the fairness hearing) and must now accept the settlement. *See, e.g., In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51 (7th Cir. 1994).

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4. Unlike some of the other applicants, the Coulters do not deny the tactical nature of their decision. For example, in Maharg's request (Doc. 176), he states, "The decision to request exclusion at this time was not made in bad faith, i.e., to obtain any tactical advantage in the class action proceedings."

The Coulters' assertion that they should be relieved from the June 13, 1994, deadline because they did not receive the notice is baseless. The Claims Administrator mailed a class notice to Ronald Coulter on May 2, 1994. *See* Affidavit of G. Peter Buchband (Doc. 202). Moreover, based on the Coulters' papers, they knew about the proposed settlement and became intimately familiar with its terms as early as May 5, 1994. *See* ¶ 16 of the Coulters' motion to intervene (Doc. 77). Because the Coulters knew about the June 13, 1994, deadline and had the ability to exclude themselves, their request (Doc. 174) is denied.

Finally, Jeanne Yokel requests an enlargement (Doc. 175) because she was allegedly unsure as to whether she is a member of the class. In her unverified request, Yokel asserts that the confusion was caused by her receiving a class notice even though she purchased an odd premium/even face value whole life insurance policy. Yokel's attorney qualifies her claim as "churning" and unrelated to the claims involved in this action.

Whether Yokel's policy is odd premium/even face value or even premium/odd face value is of little relevance in determining whether she is a class member. That information was relevant to identifying potential class members and determining whether a policyholder should have received a class notice. Thus, Yokel had no legitimate basis for being confused.

If Yokel was in doubt about her status, she should have erred on the safe side and protected her interests by submitting a timely request for exclusion.[5] The second sentence of the class notice states, "The purpose of this Notice is to advise you concerning three

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5. Alternatively, prior to the June 13, 1994, deadline, Yokel could have sought a declaration that she is not a class member. At that time, she could have obtained attorney Behrend's assistance with the class notice and determined whether declaratory relief was necessary. If Yokel sought his advise in August, she could have done so in June, before the relevant deadline. ***See In re VMS Partnership Secs. Litig.***, 26 F.3d 50, 51-2 (7th Cir. 1994). As mentioned earlier, the class notice that Yokel received informed her that she could not only seek assistance from her own attorney, but could contact class counsel or the Claims Administrator for additional information.

decisions you *must* make." (emphasis added). The class notice clearly informed Yokel that by failing to exclude herself she would be relinquishing her rights to file an individual lawsuit against Metlife and that she would be bound the adjudications in this action. Because Yokel has not shown excusable neglect for her failure to submit a timely request for exclusion, her request for enlargement (Doc. 175) is denied.

Although each of the applicants' requests is denied, any applicants wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed proof of claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER

Before the Court is a petition (Doc. 178) filed on September 21, 1994, by 26 individuals (the "petitioners") seeking a declaration that they are not members of the class. In the petition, these alleged policyholders assert that they "were aware that life insurance was part of the purchase they made from Metlife." Because they did not receive a class notice, the petitioners claim to be uncertain as to whether they are considered class members. Apparently, the petitioners wish to pursue individual claims against Metlife.[1]

However, the petitioners fail to provide any affidavits or other admissible evidence verifying their assertions. Further, even if they purchased their life insurance policies during the relevant period, the petitioners' allegations are insufficient to find that they are beyond the scope of the class definition. The settlement class consists of:

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1. The petitioners appear to be trying to do indirectly what they are unable to do directly. The deadline for opting out of the class has passed. Absent sufficient cause, all persons who qualify as class members are bound by the terms of the settlement agreement and this Court's orders.

> all persons who purchased a Metlife whole life insurance policy as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products*, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of Metlife between January 1, 1990 and October 31, 1993.

See April 22, 1994, order (Doc. 48). Awareness that the product included life insurance fails to equate with making the purchase "based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products."

The Court is unwilling (1) to declare that a group of 25 individuals is not a part of the class or otherwise (2) to unravel in a piecemeal fashion and without sufficient cause the court-approved settlement. As mentioned in a separate order, one of the bargained-for purposes of the $76 million settlement agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Granting the petitioners' request without a sufficient basis and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

Accordingly, the petition (Doc. 178) is **DISMISSED WITHOUT PREJUDICE**. As Metlife suggests in its response (Doc. 190), whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis. Among the pertinent factual questions may be the date on which the policyholder learned of this action and the pending settlement agreement. Thus, any petitioner wishing to obtain a declaration of their status in relation to this class action shall file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence.

Pursuant to Rule 53, Federal Rules of Civil Procedure, and consistent with the terms of the settlement agreement (Doc. 35) and

the applicable order (Doc. 48), Peter Grilli is appointed as a special master. Because of the large volume of petitions that may be filed, exceptional conditions require this appointment. Any petitions or other requests seeking either a declaration that an individual is not a member of the class or some similar relief are **REFERRED** to the special master to conduct any proceedings, including evidentiary hearings, to prepare reports and recommendations. Each report and recommendation shall contain findings of fact and conclusions of law. Mr. Grilli shall be compensated for his time at $150 per hour and reimbursed for all out-of-pocket expenses in connection with the performance of his duties. Unless otherwise agreed to by the parties, the fees and costs associated with each petition shall be shared equally between the petitioner and Metlife. Mr. Grilli shall be paid the fees and costs immediately upon his submission to the Court of the report and recommendation.

In light of the allegations in the petitions, the possibility exists that some, and possibly all, of the petitioners may qualify as class members. As class members, prior to June 30, 1994, they could have elected the options contained in the settlement agreement (*i.e.*, annuity or cash refund). In its response (Doc. 190), Metlife offers the petitioners the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed. Metlife is now bound to honor that offer. Any petitioner wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE